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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: JAN 17 2007

EAC 05 236 50691

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner provides information technology and development services. It seeks to employ the beneficiary permanently in the United States as a software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence. For the reasons discussed below, we concur with the director.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on March 26, 2002. The proffered wage as stated on the Form ETA 750 is $94,057 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of April 1999.

On the petition, the petitioner claimed to have an establishment date in 1997, a gross annual income of $2,000,000, no net income and 35 employees. In support of the petition, the petitioner submitted its 2002 Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on February 6, 2006, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of federal tax returns for 2003 and 2004. The director also requested evidence of the beneficiary's wages since the priority date.

In response, the petitioner submitted (1) the beneficiary's IRS Form 1040EZ, Income Tax Return for Single and Joint Filers with no Dependents for 2002 through 2004, (2) the beneficiary's Forms W-2 Wage and Tax Statements for 2003 through 2005, (3) the petitioner's bank statements for August 2001 through December 2001, January 2002 and March 2003 through May 2003, (4) the petitioner's 2000, 2001 and 2005 income tax returns, (5) evidence of a 2002 line of credit for $50,000 extended to the petitioner and (6) financial documents relating to the petitioner's shareholder.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on May 12, 2006, denied the petition.

On appeal, counsel asserts that the petitioner's tax returns and the line of credit establish the petitioner's ability to pay the proffered wage. In addition, counsel asserts that because the petitioner is a subchapter S corporation, the assets of the petitioner's shareholder can be considered. Finally, counsel cites *Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967) in support of his assertion that the petitioner's growth over the years should be considered. The petitioner submits (1) its 2003 and 2004 income tax returns, previously requested but not submitted; (2) bank statements and a tax return for the petitioner's shareholder and (3) quarterly wage and withholding reports.

The petitioner's tax returns for 2000 and 2001 predate the priority date in this matter. The remaining tax returns reflect the following information for the following years:

| | 2002 | 2003 | 2004 | 2005 |
|---|---|---|---|---|
| Net income | ($7,505) | ($55,159) | $22,693 | $87,093 |
| Current Assets | $64,729 | $38,851 | $81,872 | $205,421 |
| Current Liabilities | $12,544 | $39,140 | $59,468 | $169,067 |
| Net current assets | $52,185 | ($289) | $22,404 | $36,354 |

The 2003 and 2004 tax returns, however, were specifically requested by the director but not submitted until appeal. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the 2003 and 2004 tax returns submitted on appeal.

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner paid the beneficiary no more than $5,600 in 2002,[1] $14,638 in 2003, $28,288 in 2004 and $45,554 in 2005. The petitioner, therefore, must establish the ability to pay the difference between these wages and the proffered wage, $88,457 in 2002, $79,419 in 2003, $65,769 in 2004 and $48,503 in 2005.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. We reject, however, any argument that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

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[1] This number represents the beneficiary's total wages for the year as reflected on his tax return; the petitioner did not submit the Form W-2 issued to the beneficiary in 2002.

Net current assets are the difference between the petitioner's current assets and current liabilities.[2] A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

The petitioner paid the beneficiary $45,554 in 2005, $48,503 less than the proffered wage. In that year, the petitioner shows a net income of $87,093. The petitioner has, therefore, shown the ability to pay the proffered wage during 2005. The petitioner, however, must demonstrate an ability to pay the proffered wage continuing from the priority date in 2002.

The petitioner paid the beneficiary $14,638 in 2003 and $28,288 in 2004, $79,419 and $65,769 less than the proffered wage. The petitioner did not submit the requested tax returns for these years when requested. Thus, the petitioner has not established that its net income or net current assets in either year demonstrate the ability to pay the difference between the wages paid and the proffered wage from its net income or current assets. Moreover, without the initial required evidence for these years, we will not consider additional discretionary evidence relating to these years.

The petitioner paid the beneficiary no more than $5,600 in 2002, $88,457 less than the proffered wage. In that year, the petitioner shows a net loss and net current assets of only $52,185. The petitioner has not, therefore, demonstrated the ability to pay the difference between the wage paid and the proffered wage out of its net income or net current assets.

**Counsel's reliance on the balances in the petitioner's bank accounts is misplaced.** First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L considered above in determining the petitioner's net current assets. Finally, any money used to pay the proffered wage in one month would not be available to pay the proffered wage in the following month. Significantly, the monthly proffered wage is $7,838.08. The bank statements do not reflect monthly balances increasing by this amount. In fact, from January 2002 to March 2003, the petitioner's aggregate balance dropped from $164,143.55 to $33,497.49.

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[2] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Counsel's reliance on the assets of the petitioner's shareholder is similarly unpersuasive. A corporation, even a subchapter S corporation, is a separate and distinct legal entity from its owners or stockholders. *See Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). CIS will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage. *See Sitar Restaurant v. Ashcroft,* 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003). Moreover, the shareholder does not appear to have withdrawn large profits from the petitioner for tax purposes. For example, in 2002, the petitioner paid the shareholder only $18,000 in wages and the shareholder's share of the profits would be reflected in the petitioner's net income had the petitioner shown a net income, which it did not.

Further, the petitioner's 2002 $50,000 line of credit is not persuasive. CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). Moreover, the line of credit cannot cover the difference between the wages paid and the proffered wage in 2002 alone, whereas the petitioner must also demonstrate its ability to pay the proffered wage in 2003 and 2004.

Finally, *Matter of Sonegawa,* 12 I&N Dec. at 612, relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2002 was an uncharacteristically unprofitable year for the petitioner. While the petitioner showed a net income of $98,340 in 2000, it showed a net income of only $26,090 in 2001. The petitioner did not submit evidence of a lengthy profitable history of the type demonstrated in *Sonegawa*.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2002 or subsequently during 2003 and 2004. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER**: The appeal is dismissed.